COMMERCIAL LAND TITLES.*

IN CONTEMPLATING our jurisprudence one is struck by the fact that while the law merchant has been developed to meet the expanding needs of commerce, and while other departments of municipal law have grown, or sprung into being, in answer to the demands of an increasingly complex civilization, there has been comparatively little change in the law of realty. Certainly the evolution here has not kept pace with the revolution in many of the conditions of life, social and commercial. Perhaps this may be accounted for in part by the great abundance of land, by reason of which it has heretofore been something of a "drug on the market" in America. And perhaps it may be further accounted for by the circumstance that there was early adopted in the new world the system of recording muniments of title; which was found to be so superior to what our ancestors had been accustomed to in England that a sense of its excellence has been unduly impressed upon the public mind, until at length many have been lulled into the belief that no better system could possibly be devised. This record system has thus come to be regarded as the American system, and has been invested with all the sanctity inhering in that term. It occupies a position endeared by long use and colored by national pride, and is regarded by some as a fundamental national institution, against which no unholy hand must be raised, and in derogation of which it is akin to treason to lift a voice. Yet there is a freedom in the air we breathe, and no fetish can long withstand the sweep of American enterprise. This young nation, instinct with the spirit of progress, is ever calmly looking with wide-eyed gaze not only upon its own achievements but upon the accomplishments of every other nation. Nothing less than the world with its inspiring variety is a fit arena for such competition as our restless energies demand. In every field of thought and endeavor we reach out to the four corners of the

*Portion of an address delivered before the Georgia Bar Association, at St. Simon's Island, Ga., June 4th, 1915.

earth in trade and generous rivalry with the best and highest products of human genius. In a fragment from the pen of that great—I had almost said greatest—English philosopher, Sir Francis Bacon, who was also a lawyer of tremendous lore, in sketching "The New Atlantis," he said:

> "But thus you see we maintain a trade not for gold, silver, or jewels; nor for silks; nor for spices; nor for any other commodity of matter; but only for God's first creature, which was Light; to have light (I say) of the growth of all parts of the world."

COMMERCIAL LAND TITLES.

We are to consider the subject of Commercial Land Titles, and, as Sir Robert Richard Torrens has the distinction of having first embodied this idea into law among English-speaking peoples, it has come to be generally known as the "Torrens System." He was born at Cork, Ireland, in 1814, and was educated at Trinity College, Dublin. In 1840 he emigrated to South Australia, and became Collector of Customs at Adelaide in 1841. In January, 1852, he was appointed Colonial Treasurer and Registrar General, and when the Colonial Government was established in 1857, he represented the City of Adelaide in the House of Assembly and became the first Premier of South Australia. His duties as Collector of Customs having made him familiar with the shipping laws, about the year 1850, he conceived the idea of applying their principles to the registration of land. In consequence of his efforts, on January 27, 1858, the "Torrens Act" became the law of South Australia. It then spread with some rapidity throughout Australia and now prevails not only there but in Tasmania, New Zealand, and the Fiji Islands, throughout a great portion of the Dominion of Canada, and in a modified form in England. In this country the principles of the system have been enacted into law in eleven states, namely, California, Colorado, Illinois, Massachusetts, Minnesota, Mississippi, North Carolina, New York, Ohio, Oregon and Washington; and it is also in force in Porto Rico, Hawaii and the Philippine Islands. In many other states the subject is being actively agitated, and further legislation is expected.

THE TORRENS SYSTEM.

In "An Essay on the Transfer of Land by Registration," published in 1882, Sir Robert Torrens made the following claims for the system devised by him:

"First. It has substituted security for insecurity.
"Second. It has reduced the cost of conveyancing from pounds to shillings, and the time occupied from months to days.
"Third. It has substituted clearness and brevity for obscurity and verbiage.
"Fourth. It has so simplified ordinary dealings, that any person who has mastered the three R's can transact his own conveyancing.
"Fifth. It affords protection against the largest class of frauds, such as those perpetrated by the notorious Down and recently by J. F. Cooper.
"Sixth. It has restored to their natural value many estates held under good holding titles, but depreciated on account of some blot or technical defect, and has barred the recurrence of any such defect.
"Seventh. It has largely diminished the number of chancery suits by removing the conditions which afford grounds for them."

In the second volume of his History of Australia, George William Rusden, referring to the achievements of Sir Robert Torrens, says:

"Wherever he struck, groans of lawyers warned him that his deeds were impious. It was impossible, they said, that aught but unutterable woe could flow from his rashness:—*non turba questa secreta sede.* * * * Public opinion supported him against bench, bar, and scrivener. Amid learned prophecies of failure he achieved success. Title by registration was substituted for title by deed. His instructions to all who desired to bring their property under the new law were so clear that any ordinary person with time at his disposal could dispense with legal assistance in complying with the forms; and the cost was almost nominal. Useless dust of ages was swept away. By the old law every change of ownership lengthened the chain of which each link had to be tested in every subsequent transaction. By the new law the last registration was complete in itself, and no retrospective searches or opinions—no new intricate

> deeds—were needed. * * * At the end of 1879, the value of property brought under the Act was nearly twelve million sterling in South Australia alone. Long before that time Mr. Torrens had grafted his reform upon the neighboring colonies. To some he went while the lawyers were arraying their forces gainst the dreaded innovation which was everywhere proposed, everywhere opposed, but everywhere triumphant. In some places, when defeat was impending, the legal fraternity made a merit of necessity; and when they could not stay the measure, induced the Government to make a lawyer the Registrar-General, with a view to maintain legal technicalities in fact or form. His opponents continually asserted that Mr. Torrens did not understand the difficulties of the case, but events proved that defects in comprehension were not on his side."

This vigorous summary affords a fair sketch of what has taken place wherever an effort has been made to introduce the Torrens ideas. No proposition has ever been fought with more bitterness and none has ever triumphed more completely over all enemies. No country or state which has ever adopted it has abandoned it, and it has been steadily spreading year by year.

The Record System.

Under the record system we deal with evidences of title. These are permitted to be recorded and their recordation gives constructive notice of their contents to all the world, each record ranking, as a rule, in the order in which it is recorded. Yet in some states judgments relate back to the beginning of the term of court in which they were rendered; and in some states deeds take effect as of their date, when recorded within the statutory period. Also in some states there is no limitation upon the time within which a will may be probated and recorded. In addition to these provisions creating uncertainties in titles on the face of the record, many things may affect a title which are not required to be recorded at all, such as marriage and divorce, intestacy, prescription, and adverse possession.

Thus the record system, even at its best, is "a delusion and a snare." To catalogue and discuss all the pitfalls it provides for those who deal in lands, would carry us beyond the time at

our disposal. It creates a lengthening chain of title, never any stronger than its weakest link, and piles up unending bits of evidence which must first be found and fitted together before any figure can be made out. It affords difficult puzzles which can only be solved by highly-trained experts at ever-recurring cost of time, labor and money. Every transfer, or the mere lapse of time, adds rubbish to the heap. And thus every title is loaded with burdens and clouded by uncertainties, so that, even under the best conditions, it is stripped of everything like negotiability. Indeed the idea of negotiability of land titles seems never to have occurred to our legislators, and is positively abhorrent to many legal minds. Apart from the tremendous accumulation of records, which must all be indefinitely preserved under this system, it is apparent that the difficulty of sifting the evidence increases at a cumulative rate. This means more time, more skill, more pay for every determination of title as the years roll by. There is no way under the record system by which a title can be perfected "against all the world"—except by adverse possession; and even if a title can be considered perfect at any moment, there is no way under this system by which it can be kept perfect "against all the world"—except by continuous adverse possession and the preservation of all tax receipts. And let us add that there must be a fresh examination of title every time there is any transaction in land. This system imposes a perpetual special tax on lands for the special benefit of title examiners, abstract companies and title insurance companies, in addition to all state, county and city taxes and levies and assessments, from which there is no hope or possibility of evasion. Personal property may escape or be relieved, but real estate, never!

The Registration System.

Now, from this, turn to the title registration system, and it is like emerging from dark, damp and dangerous caverns into sunshine and safety. For here we no longer deal with mere evidences of title, but with the title itself. Every step is taken openly, and each step marks final progress. There is no looking backward, but a steady forward march. Each transfer or trans-

action is a transfer or transaction of title. Grasp this idea once, and you can never lose it. In principle, it means the negotiability of land; and therefore it means the end of examinations of titles. This is the ideal, yet there are some exceptions to finality, notably in the case of fraud; and doubtless it will take some time for the business world to shake off the custom of requiring some examination of title. But though examination may be deemed necessary, their scope will be greatly curtailed, the matter to be examined will be greatly reduced, and thus there will be a material reduction of time and cost and the result can be predicated with certainty. It is manifestly impossible within the scope of this paper to discuss all the details of the system. It is sufficient to say that original registration is obtained by a proceeding *in rem,* in which by personal service of process against all known resident claimants and contiguous owners and notice by publication to "all parties interested," a decree is entered determining the title, and declared to be binding on the land "against all the world." The distinctive feature of this and all other proceedings under the act is that they are *in rem*; and this must always be borne in mind. Proper surveys are made during the proceedings and the bounds of the land are durably marked. A thorough examination of the title is made by an official examiner, who has the powers of a referee or commissioner in chancery for the taking of any evidence that may be offered, and after full opportunity for every one to be heard a final decree is entered. This decree is registered in the Register of the Registrar of Titles and forms the Original Certificate of Title. A Duplicate Certificate is then given the owner and becomes in his hands a security somewhat similar to a registered certificate of stock, or a registered bond. Thereafter nothing can affect the title except what is registered from time to time on the Original Certificate in the Registrar's Office. This Original Certificate never leaves the Registrar's Office; and as space is left for the registration of all subsequent transactions affecting the same land, the separate folium devoted to each title becomes what may be termed a ledger account with that title. Thus any one can tell at a glance, or after a little study, exactly how the title stands. When any entry is made on the Original Cer-

tificate, the holder of the Duplicate is notified to produce it before the Registrar in order that the copy may be kept up to date. After the original registration of the title by decree as stated, subsequent transactions are registered by the Registrar, under the supervision and direction of the Court. Such transactions must be either "voluntary," as a sale or mortgage, or "involuntary," as a judgment or statutory lien; and for the registration of such subsequent transactions proper authority must be presented to the Registrar. Deeds are not abolished, but as registration is the only effective act to pass title, they become merely contracts between the parties and evidence of authority for registration. In case of doubt or dispute as to the proper registration of any transaction, the question may be summarily submitted to the Court, which is always open as a Court of title registration. For the highest success of the system there should be a special Land Court, or Courts, as in Massachusetts; but in other states jurisdiction for registration is conferred on existing tribunals, like your Superior Courts. An Assurance Fund is provided by a small tax of one-tenth of one per cent of the assessed value of the land, paid upon original registration, for the protection of any just claimant who may suffer loss or injury by the operation of the act.

Objections.

Every objection suggested by legal ingenuity has apparently been made to convince the courts that the provisions of such an act are contrary both to the constitutions of the several states in which it has been enacted, and in violation of the Constitution of the United States.

The first act was passed by Illinois in 1895, and that was declared unconstitutional in People *v.* Chase.[1] Thereupon the legislature promptly passed another act in 1897, the constitutionality of which was upheld in People *v.* Simon.[2]

Ohio passed an act in 1896 which was pronounced unconstitutional in State *v.* Guilbert,[3] but the demand for such legislation

[1] 165 Ill. 527, 46 N. E. 454.
[2] 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801.
[3] 55 Ohio St. 575, 47 N. E. 558.

grew so insistent that the state constitution was amended in 1912 to give the legislature a free hand, and another Ohio act was passed in 1913. This act will probably enjoy the unique distinction of being immune from constitutional attack, at least on the ground that it is contrary to the state constitution, since that instrument has made special provision for it and has gone so far as to permit judicial functions to be exercised by county recorders or other officers in matters arising under registration proceedings, subject to the right of appeal.[4]

The stock objections have been:

First: That judicial powers have been conferred upon the registrars.

Second: That the acts do not afford "due process of law." These and all other objections yet raised have been answered by a number of cases in which the constitutionality of the acts has been sustained.[5]

The only case that has yet gone to the Supreme Court of the United States is Tyler *v.* Judges,[6] in which the writ of error was dismissed because the plaintiff in error did not have the requisite interest to bring in question the constitutionality of the act. Thus there was no decision on the merits, but the dismissal practically resulted in the confirmation of the Massachusetts court over which Mr. Justice Holmes, now a distinguished member of the Supreme Court, was then presiding as Chief Justice. And it is interesting to note that this decision of the Massachusetts Court was delivered by its Chief Justice. It is also interesting to note that the constitutionality of the Massachusetts act has never since been questioned.

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[4] Ohio Constitution, Art. II, Sec. 40.

[5] People *v.* Simon, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801; Tyler *v.* Judges, 175 Mass. 71, 55 N. E. 812, 179 U. S. 405; State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297; National Bond Co. *v.* Hopkins, 96 Minn. 119, 104 N. W. 678, 816; Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129; People *v.* Crissman, 41 Col. 450, 92 Pac. 949; McMahon *v.* Rowley, 238 Ill. 31, 87 N. E. 66; Brooke *v.* Glos, 243 Ill. 392, 90 N. E. 751; Waugh *v.* Glos, 246 Ill. 604, 92 N. E. 974; Hammond *v.* Glos, 250 Ill. 32, 95 N. E. 39; Peters *v.* Duluth, 119 Minn. 96, 137 N. W. 390; Tower *v.* Glos, 256 Ill. 121, 99 N. E. 876.

[6] *Supra.*

In a recent article in the Yale Law Journal[7] Mr. William C. Niblack says:

> "The only cases in this country which treated of or discussed any fundamental principles of the Torrens System are People *v.* Chase, 165 Ill. 527, and State *v.* Guilbert, 56 Ohio St. 575, and they touched on them in a meagre way."

By a strange coincidence these are the cases mentioned above by which the original Illinois and Ohio acts were declared unconstitutional. And it happens that Mr. Niblack is the author of a treatise published in 1903, entitled, "The Torrens System, Its Cost and Complexity," in the preface to which he frankly confesses that for twelve years he has been "one of the stockholders, officers and attorneys of the Chicago Title and Trust Company." This corporation had an income of $496,952.58 from the examinations of title alone in 1903, when Mr. Niblack's book was written, to say nothing of what it gathered in from its business of insuring titles. Mr. Niblack admitted that the income of his company would be seriously affected by the growth of the Torrens System, and then added generously: "This fact may affect my judgment and render me less capable of passing impartial opinions on the distinctive features of the Torrens Laws." Having thus unburdened his conscience, he then proceeded to attack the Torrens System from every conceivable point of view in an elegant and highly entertaining manner. The book appeared about the time it was being proposed to amend the Illinois act so as to introduce a compulsory provision requiring the lands of decedents to be registered. This amendment was submitted to a vote of the people of Chicago and Cook County in November, 1904, and was carried by a popular majority of 211,883. The total vote was 241,926, and the combined efforts of the great title companies and all opponents of the Torrens System only succeeded in mustering 30,043 persons against it. Then the fight was carried into the courts, and, in Harvey *v.* County of Cook,[8] it was held that the amendment was void because of technical defects in its submission to the popular

[7] Vol. XXIV, No. 4, Feb. 1915.

[8] 221 Ill. 76, 77 N. E. 424.

vote. Thereupon the legislature stepped in and passed the Act of 1907, to accomplish the same purpose, and this was upon submission confirmed by popular vote in 1910. These facts are mentioned as an indication of the persistency with which the fight has been conducted in Illinois. That Mr. Niblack has not lost interest in it is evidenced not only by his article in the Yale Law Journal, but by the fact that in 1912, he published another edition of his book entitled, "An Analysis of the Torrens System of Conveying Land." As its title implies this work is more philosophically written, though not altogether free from the partisan spirit, and he still frankly warns us that while he has endeavored to write with fairness and has taken much care to make correct statements of law and facts, "in view of his interests, however, it is proper to subject any conclusions of the writer to any tests known to the reader." Therefore I have mentioned the circumstances detailed above, not in any sense to discredit Mr. Niblack, whom I honor as an able member of the bar, but in order that his mental attitude may be made plain. For otherwise the statement I have quoted from the Yale Law Journal would be inexplicable. He says there that People *v.* Chase and State *v.* Guilbert are the only two American cases that have treated or discussed any fundamental principles of the Torrens System. In the same article he tells us that one of such fundamental principles is involved in the right of the Registrar to register subsequent transactions, and that any attempt on his part to do so must require the exercise of judicial functions and be violative of the Fourteenth Amendment prohibiting any state from depriving any person of property "without due process of law." Yet in People *v.* Simon,[9] the court in answering this very contention, said (italics ours):

> "*The true theory of this act,* as we understand it, is that all holders of vested rights shall be subjected to an adjudication of competent jurisdiction, upon due notice, in order that the true state of the title may be ascertained and declared, and that thereafter the tenure of the owner, the right of transfer and encumbrance, *and all rights subsequently accruing shall be determined in accordance with the rules now*

[9] 176 Ill. 165, 52 N. E. 910, 914, 44 L. R. A. 801, 808.

prescribed. 'A state may, by statute, prescribe the remedies to be pursued in her courts, and may regulate the disposition of the property of her citizens by descent, devise, or alienation.' (3 Washb. Real Prop., 4th ed., p. 187.) 'The right of ownership which an individual may acquire must therefore, in theory at least, be held to be derived from the state, and the state has the right and power to stipulate the conditions and terms upon which the land may be held by individuals.' (Tiedeman, Real Prop., 2d ed., § 19.) *'The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer,* and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, *is undoubted.* (Arndt *v.* Griggs, 134 U. S. 316, 321.) *'The power of the legislature in this respect* (as to changing the rules of evidence as to the burden of proof), whether affecting proof of existing rights, or as applicable to rights subsequently acquired, or to future litigation, so long as the rules of evidence sought to be established are impartial and uniform in their application, *is practically unrestricted.'* (Gage *v.* Caraher, 125 Ill., 447, 455.) It being true that the law may prescribe rules of property and rules of evidence by which the title is to be shown, *we see no reason why the transfer of real estate may not be made in the way contemplated,* and why it may not be made compulsory to make it in that way, if the legislature so determines."

And in Tyler *v.* Judges,[10] the court said (italics ours):

"The ordinary business of registration is very nearly ministerial. There is no question to be raised, or which can be raised. If there is a question, either raised by any party in interest or occurring to the assistant recorder, it is to be referred to the judge for decision (§ 53). But whatever may be thought of the original act, by amendment even *the ordinary business is to be done only 'in accordance with the rules and instructions of the court.'* (St. 1899, c., 131., § 8.) *Under this amendment registration is the act of the court. The fact that it may be done by the assistant recorder under general orders when there is no question is not different from the power of the clerk to enter judgment in cases ripe for judgment under a general order or rule of the superior court."*

[10] 175 Mass. 71, 55 N. E. 812, 815.

And in State *v.* Westfall,[11] the court said (italics ours):

> "*The registration is the act of the court.* The fact that it may be done by the Registrar, under general orders, where there is no question, is not different from the power of the clerk to enter judgment, in cases ripe for judgment, under the general order or rule of the court."

And in Robinson *v.* Kerrigan,[12] the court said (italics ours):

> "*There is no force to the objection.* Every administrative officer is frequently called upon, in the discharge of his duties, to decide questions of law relating thereto. Recorders determine deeds, leases, mortgages, etc., before recording. The sheriff determines, for his own guidance, ownership of property before levying. The duties required of the Registrar by these sections are of the same nature. His decision in the matter is not conclusive. If he decides wrongfully and refuses to perform the appropriate duty in the premises, he may be compelled to act properly by a writ of mandamus, the same as any other ministerial officer who mistakes his duty under the law and refuses to perform it."

Thus these cases clearly refute both statement and argument of Mr. Niblack mentioned above.

But the concluding sentence of Mr. Niblack's article is, if anything, even more remarkable, than that quoted above; for he says: "The so-called Torrens cases which have arisen in this country do not touch the pivotal points of the system, and a discussion of the Torrens System in the light of these cases, leads nowhere except to confusion." And this statement is made in face of the fact that Torrens Acts have been in existence in these United States since 1897, a period of eighteen years; that they have been repeatedly attacked by persons and corporations of wealth and influence vitally interested in overthrowing them; and that they have withstood assaults and tests of every sort in about one hundred reported cases. And to descend from generalities to particulars "the true theory" of the Illinois act and many of its special provisions, was, as we have

[11] 85 Minn. 437, 89 N. W. 175, 179, 57 L. R. A. 297, 303.
[12] 151 Cal. 40, 90 Pac. 129, 132.

seen, discussed in People *v.* Simon, by the same court which decided People *v.* Chase. And in Tyler *v.* Judges [13] the court said (italics ours):

> "*The act shows throughout* the intent that no one shall be concluded without having a chance to be heard; and although some of its methods are new to this commonwealth, we cannot say that the precautions as to notice are insufficient in substance or form."

And in State *v.* Westfall,[14] the court said (italics ours):

> "*Actions and proceedings to conclusively establish rights and titles* against all claimants and parties, known and unknown, are not novelties in our jurisprudence, for decrees probating wills, distributing estates of deceased persons, quieting title to real estate against unknown heirs and unknown parties have been repeatedly held to be conclusive on the whole world. * * * The proceeding provided for by the act in question is * * * substantially *in rem,* the subject-matter of which is the state of the title of land within the jurisdiction of the court, and the provisions of the act for serving the summons and giving notice of the pendency of the proceeding are full and complete, and satisfy both the state and federal constitutions. To hold otherwise would be to hold that the courts of this state can not in any manner acquire jurisdiction to clear and quiet the title to real estate by a decree binding all interests and all persons or parties, known or unknown. * * * That the courts of this state have jurisdiction to so clear and quiet title by their decrees is no longer an open question in this state."

And in McMahon *v.* Rowley,[15] the court said (italics ours):

> "*The general features of the Registration Act were held constitutional* by this court in People *v.* Simon, 176 Ill., 165. Plaintiffs in error are in no condition to raise the constitutionality of this section."

And in Hammond *v.* Glos,[16] the court said (italics ours):

> "*The appellants concede that this court has held the Torrens Law, as amended, constitutional,* and make no contention

[13] 175 Mass. 71, 55 N. E. 812, 816.
[14] 85 Minn. 437, 89 N. W. 175, 177, 57 L. R. A. 297, 303.
[15] 238 Ill. 51, 87 N. E. 66, 68.
[16] 250 Ill. 32, 95 N. E. 39.

on that branch of the case. Waugh *v.* Glos, 246 Ill. 604; Culver *v.* Waters, 248 Ill. 163."

Is there any "confusion" about the "light" of these cases except to one affected with a certain sort of mental strabismus? Moreover Mr. Niblack himself has said: [17]

"Nevertheless, in a general way, *where the constitutionality of the whole acts was challenged,* and where no specific function of the Registrar was under consideration, the courts have held that where he registers a transfer of registered land from the last registered owner, or where he notes on a certificate a mortgage or lien, his functions are not necessarily judicial."

SUPREME COURT DECISIONS.

But it may be replied that the cases cited are only state decisions, and that nothing short of a final deliverance from the Supreme Court of the United States can really settle the questions involved. Therefore we will now consider some of the decisions of that court, and in doing so, let us recall the well-established doctrine that every state has the power to regulate the manner and conditions upon which real and personal property within its territory may be acquired, enjoyed, and transferred.

"Substituted services by publication or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent, and it proceeds upon the theory that its seizure will inform him not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure of its condemnation and sale. * * * In other words such service may answer in all actions which are substantially proceedings *in rem.*" [18]

A state has "control over property within its limits; and the condition of ownership of real estate therein, whether the owner

[17] Analysis, p. 261.

[18] Pennoyer *v.* Neff, 95 U. S. 174.

be stranger or citizen, is subject to its rules concerning the holding, the transfer, liability to obligations private or public, and the mode of establishing title thereto, * * * and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibition of the constitution, or against natural justice." [19] "The power of the state to regulate the tenure of real property within her limits, and the modes of acquisition and transfer, * * * is undoubted." [20]

Due Process of Law.

But when driven from every frontier fortress that might have protected from invasion their preserves, the title companies and other opponents of title registration have diligently sought to entrench themselves in the mysteries of the Fourteenth Amendment. Their battle cry is "due process of law," and as if there were magic in the phrase they shout it from the firing line at the advancing host of conquerors, and mumble it in their prayers amidst rout and confusion. Doubtless we shall hear it from the depths of despair, with their expiring breath, as their last agonized cry is being hushed into silence. Let us, therefore, probe the mystery, and calmly inquire what there is in the sound with which the air is burdened. "Due process of law"—it is hurled by leader and followers from the ranks of the title examiners and insurers with all the confidence reposed in a deadly asphyxiating bomb. We admit the glorious uncertainty of the phrase, and its stunning effect when exploded without warning in the heat of a constitutional argument. But fortunately certain screens have been furnished by the highest authority, and by the use of them clear thought and the quiet beating of the pulse may be preserved.

In the first place, we observe that the Supreme Court of the United States has remarked more than once upon "the abundant evidence that there exists some strange misconception of this provision" in the minds of many lawyers who have sought to

[19] Arndt *v.* Griggs, 134 U. S. 31.

[20] United States *v.* Fox, 94 U. S. 315. See also McCormick *v.* Sullivant, 10 Wheat. 202; Beaureguard *v.* New Orleans, 18 How. 497; Snydam *v.* Williamson, 24 How. 427; Christian Union *v.* Yount, 101 U. S. 352.

invoke it as a general prohibition statute against any and every state enactment that may pinch the plans or activities of their clients; and this august tribunal has been wearied and worn into chiding those members of the bar who have looked upon the clause "as a means of bringing to the test of the decision of this Court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation in which such a decision may be founded." [21]

The Court has never undertaken to give any comprehensive definition of the phrase, but has declared that it will deal with each case as it arises, pronouncing it the part of wisdom to ascertain the intent and application of such an important phase of the Federal Constitution, "by the gradual process of judicial inclusion and exclusion, as the cases presented for such decision shall require, with the reasoning on which such decisions may be founded." [22] It is believed that a sufficient number of such cases have now been decided to establish the constitutionality of the bill under discussion, as will appear from the following citations. Due process of law does not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts; [23] it does not necessarily imply delay; [24] nor a plenary suit and trial by jury; [25] it does not require presentment and indictment by grand jury,[26] but an information instead of an indictment is sufficient.[27]

> "What is due process of law must be determined by circumstances. To those in the military or naval affairs of the United States, the military law is due process." [28]

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[21] Davidson *v.* New Orleans, 95 U. S. 97; Missouri Pacific, R. R. Co. *v.* Humes, 115 U. S. 512.

[22] Davidson *v.* New Orleans, *supra.*

[23] Murphy *v.* Hoboken Land Co., 18 How. 272.

[24] Kennard *v.* Louisiana, 92 U. S. 480.

[25] Simon *v.* Craft, 182 U. S. 427; Ex parte Wall, 107 U. S. 265; Holden *v.* Hardy, 169 U. S. 366; Walker *v.* Savannah, 92 U. S. 90; Tinsley *v.* Anderson, 171 U. S. 101.

[26] Hurtado *v.* California, 110 U. S. 16; Caldwell *v.* Texas, 137 U. S. 692.

[27] Hodgson *v.* Vermont, 168 U. S. 261; Bolln *v.* Nebraska, 176 U. S. 83; Maxwell *v.* Dow, 176 U. S. 581; Davis *v.* Burke, 179 U. S. 399.

[28] Reaves *v.* Ainsworth, 219 U. S. 296.

CONSTITUTIONAL CONSTRUCTION.

It was John Marshall, the great Chief Justice, who said:

> "A constitution is framed for ages to come, and is designed to approach immortality, as nearly as human institutions can approach it."

Therefore, we can safely say, there must be nothing narrow nor hide-bound in its interpretation, but as the horizon widens with the progress of development and the elevation of thought, the Constitution of the United States must be permitted to expand its beneficent provisions over the changing conditions and relations of social and commercial life.

In Holden *v.* Hardy,[29] a review of all the cases concerning due process of law led to the statement that in passing upon the validity of state legislation under the Fourteenth Amendment,

> "This Court has not failed to recognize the fact that the law is to a certain extent a progressive science; that in some of the states methods of procedure which, at the time the Constitution was adopted, were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary."

And after mentioning some of the notable changes that had taken place in the laws and jurisprudence of England and America, attention was called to the probability that other changes of no less importance might be made in the future. The Court said:

> "The Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land."

In the earlier case of Hurtado *v.* California,[30] it had been finely said:

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[29] 169 U. S. 366.

[30] 110 U. S. 516, 530.

"The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered, and to be gathered, from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. * * * There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experience of our situation and system will mould and shape it into new and not less useful forms."

And in Twining *v.* New Jersey,[31] the Court speaking through Mr. Justice Moody, said:

"A procedure settled in English law at the time of the emigration, and brought to this country, and practiced by our ancestors, is not an essential element of due process of law. If it were, the procedure of the first half of the seventeenth century would be fastened upon American jurisprudence like a straight-jacket, only to be unloosed by constitutional amendment."

Extremity of Opposition.

After successive defeats in every state, the opponents of title registration have finally been compelled to admit that original registration may be made by court proceedings without violating the Fourteenth Amendment. But they now say that every subsequent registration "by the Registrar of Titles" is a denial of "due process of law" and therefore void.

In answer to this objection it must be noted in the first place that, according to the theory of the acts every registration is an act of the court and the Registrar is expressly declared to

[31] 211 U. S. 78.

perform all his functions under the supervision and direction of the court. In addition to this, provision is generally made for an appeal from any decision or act of the Registrar. Yet he is held up by the irreconcilables as an "autocrat" and a "tyrant" with power to rob any man of his property by intent or inadvertence.

In this connection, while considering the effect of subsequent registrations, it is well to remind ourselves again that all proceedings under title registration acts are proceedings *in rem.*

As Mr. Chief Justice White has said, speaking for an undivided court:[32]

> "It is elementary that a probate proceeding by which jurisdiction of a probate court is asserted over the estate of a decedent for the purpose of administering the same is in the nature of a proceeding *in rem,* and is therefore one as to which all the world is charged with notice."

Also the same court, speaking through Mr. Justice Peckham, has said:[33]

> "There is nothing in the Federal Constitution which directly or impliedly forbids a state to confer judicial functions upon non-judicial bodies."

From these and other cases it is apparent that the Fourteenth Amendment will always be construed in the light of practical affairs, local conditions, and the habits, customs, and traditions of particular communities.

Title registration has been in vogue in some communities of the United States for some eighteen years; it has been held to be constitutional by the Supreme Courts of every state in every case in which it has been attacked since 1897; thousands of tracts of lands have been registered and transferred many thousands of times; millions of dollars are at stake; the rights and interests of thousands of citizens are actually affected, while those of millions are more remotely involved: I put the question to the calm judgment of the American bar:

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[32] Goodrich *v.* Ferris, 214 U. S. 71.

[33] Consolidated Rendering Co. *v.* Vermont, 207 U. S. 451.

What likelihood is there, under these circumstances, that the Supreme Court of the United States can ever be induced to declare title registration to be unconstitutional?

Let the call be made for an answer from each august justice in the serene atmosphere of his high office, and I doubt not that the unanimous answer would come, *mutatis mutandis,* somewhat in the language of Mr. Justice Holmes in the taxation case of Paddell *v.* New York: [34]

> "The plaintiff has many difficulties in his way. In the first place the mode of taxation is of long standing, and, upon questions of constitutional law, the long-settled habits of the community play a part as well as grammar and logic. If we should assume that, economically speaking, the present system really taxes two persons for the same thing, the fact that the system has been in force for a very long time is of itself a strong reason against the belief that it has been overthrown by the Fourteenth Amendment, and for leaving any improvement that may be desired to the legislature."

And again, from the same case:

> "It is a fitting answer to say that you cannot carry a constitution out with mathematical nicety to logical extremes."

Police Power.

But it is argued that operations under the title registration acts will, or may, result in the taking of private property for private uses without "due process of law." The same argument was made in the Oklahoma Bank cases under the statute creating a depositors' guaranty fund by an assessment of one per cent on the average daily deposits of state banks. Hear what the Supreme Court said, again speaking through Mr. Justice Holmes: [35]

> "The substance of the plaintiff's argument is that the assessment taxes private property for private uses without compensation. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the

[34] 211 U. S. 446.

[35] Noble State Bank *v.* Haskell, 219 U. S. 104, 110.

great guaranties in the bill of rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it is often difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law making power."

And then, developing the idea of the Court, he continued: [36]

"It may be said in a general way that the police power extends to all the great public needs. (Camfield *v.* U. S., 167 U. S. 518.) It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of these conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If, then, the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it."

What more need be said? It does not take a prophet nor the son of a prophet, it seems to me, to forecast what the decision of the Supreme Court of the United States will be upon any question that may be brought before it to test the constitutionality of land registration. For of all the public needs none is greater than the need for revised modern methods in dealing with lands. This is true from a sociological as well as a commercial standpoint.

Sociological Needs.

The doctrines of the socialists are with them in the nature of a cult. This is what makes them really dangerous. This it is which carries them to such extremes and arouses a sort of religious fervor soon kindled into obdurate fanaticism. Mr. Henry

[36] Noble State Bank *v.* Haskell, 219 U. S. 104, 111.

George wielded a powerful pen, and "Progress and Poverty" is one of the most remarkable productions of the nineteenth century. Its influence is growing, and its author "though dead, yet speaketh" in persuasive tones to an ever widening audience. The climax of the work is contained in these words:

> "We have traced the unequal distribution of wealth which is the curse and menace of modern civilization to the institution of private property in land." [37]

And the remedy he proposes is this:

> "We must make land common property."

However much we may differ, both from the premises laid down and the conclusion reached by Mr. George, we must take note of facts and be prepared to deal not only with his abstract theories but with such actual conditions as may result therefrom. No real pressure has yet been felt to any extent on account of what has been a superabundance of land. But events are moving swiftly and the time for reckoning with dormant forces and latent powers may arrive sooner than anticipated. After mature deliberation I hold the opinion that the best and safest way to deal with the rising tide of socialism is to make lands, as far as possible, negotiable.

Negotiable Land Titles.

It matters not with what laborious accuracy we may marshal facts to contradict the statements made by Mr. George and his followers. It matters not with what precise logic we may demonstrate the errors of his arguments. Hunger and pain and envy and greed and passion are deaf to reason. But if acquisition of titles and the commercial use of lands be made easy; if men be encouraged to acquire and hold lands with the freedom that other property may be acquired and held; if men be permitted to utilize land as a basis of credit as readily as personal property; in short, if lands be made practically fluid and negotiable: these things will increase the number of land owners,

[37] Progress and Poverty, p. 295.

and as land owners are multiplied the demand to make land common property will be diminished, and the power to do so will be weakened. Nothing of a material nature will elevate the standards of citizenship more than the general ownership of lands; and any law with that tendency will greatly promote the public welfare. Add to this the fact, that title registration encourages traffic in lands to the fullest extent, and the argument seems to be complete in its favor.

Real and Personal Property.

And when the matter is calmly considered, why should there be such distinctions as now exist in the laws governing real and personal property? Is it not due to the fact that the public mind, led by bench and bar, has been content to accept antique forms without considering fundamental principles, and has suffered the transfer of lands to be complicated and restricted by the zeal of scriveners in perpetuating quaint and traditional instruments and methods? Mr. Blackstone speaks of the "art and finesse of the Norman lawyers," and after describing the "qualities, fruits and consequences" of the feudal tenures, declares:

> "A slavery so complicated and so extensive as this, called aloud for a remedy in a nation that boasted of its freedom." [38]

Livery of Seisin.

Of our freedom we are wont to boast, and we fancy that our methods of preserving and transferring titles are far superior to those of our ancestors. But tell me, did not the ancient "livery of seisin" by which title was passed by the delivery to the feoffee of a clod or turf or a twig or bough from the land, in the presence of witnesses, more nearly give to land a negotiable feature than the methods now employed by us? The fundamental test of negotiability is the transfer of title to property by delivery of the thing itself, and "livery of seisin" was the transfer of title by the typical delivery of the land itself "in the name of seisin." The record of our deeds is in no sense a record of

[38] 2 Bl. Comm. 52.

title but merely a record of evidences of title, as is well known. And do we not deceive ourselves when we fancy that the delivery of a deed is delivery of title? What we need is an actual delivery of title in every transaction with lands, and this can only be accomplished by the registration of title.

Burdens on Lands.

With these ideas in mind, let us ask ourselves is it inherently essential that the vendor of land should not be able to pass title to his vendee without the intervention of an expert third party? What is there in the nature of things about a fifty-dollar piece or parcel of dirt which makes it more difficult and expensive to transfer than a $5,000 diamond or a $50,000 painting? Why does it take longer and cost more to pass title to a one-hundred-dollar tract of land than to $10,000 worth of stocks or bonds? Much land can be bought for ten, twenty, fifty or one hundred dollars an acre: Why should there be so much "red tape" and incessant expense about the thing?

And then let us ask ourselves these questions: Suppose the title to every bale of cotton, bushel of grain, or pound of tobacco had to be examined before it could be bought, what would become of commerce? Suppose the title to every stock and bond had to be examined before purchase, what would happen to trade? And how would these conditions affect the market value of goods and securities? And how would these conditions affect the banking interests, the credit of merchants and farmers, the small capital of laborers, and all the relations of business? It is not an exaggeration to say: If a small fraction of the burdens on lands were imposed on personal property, a bloody revolution would be precipitated in less than thirty days.

The Demands of Commerce.

"Experience hath shown," said Mr. Blackstone, "that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and unrestrained." This utterance, made a century and a half ago, has been echoed and re-echoed by succeeding pub-

licists, and every passing year has demonstrated its truth. There is no country more commercial than America, and none in which there is greater need for the free and unrestrained transfer and circulation of land. The demand is beginning to be heard from mountain, forest, and valley, and the swelling cry bids fair to sound above the booming of the surf on the continental confines of our broad domain. Already some answer has been given, though in a very imperfect manner, by certain provisions of the Federal Reserve Act of 1913, and a fuller response is promised by the next Congress in an Act for the Promotion of Rural Credits. But these measures can only afford very partial and limited relief, since they do not profess to go to the root of the matter. Nothing short of Registered Title can give to land any of the true attributes of a commercial asset. To answer the great public needs we must make land in a sense negotiable.

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